ESTTA Tracking number: **ESTTA722779**

Filing date: **01/26/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91225104
Party	Plaintiff DRL Enterprises, Inc.
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Attachments	Opposers_Motion_to_Strike_Applicants_Answer.pdf(130986 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

DRL ENTERPRISES, INC. Opposer, v. ATMOS NATION LLC Applicant.	Opposition No. 91225104 Mark: I50 Serial No.: 86/604,124

Opposer's Motion to Strike Applicant's Answer

Opposer, DRL Enterprises, Inc. ("DRL Enterprises"), pursuant to Federal Rule of Civil Procedure 12(f) and TBMP § 506, hereby moves the Board for an order striking Applicant's non-responsive Answer, which fails to admit or deny a single allegation of DRL Enterprises' Notice of Opposition and is rife with improper matter. Applicant's Answer is manifestly insufficient and serves only to clutter the proceedings.

Applicant's Non-Responsive and Improper Answer Should Be Stricken

On December 1, 2015, DRL Enterprises initiated this proceeding to oppose Applicant's, registration of the mark I50 in connection with "oral vaporizers for smokers; oral vaporizers for smoking purposes" on the basis that Applicant's use and registration of the I50 mark is likely to cause confusion with DRL Enterprises' "1.0," "1.25," and "1.5" marks (the "One Marks"), which DRL Enterprises has used for decades in connection with a unique and proprietary blend of cigarette papers. DRL Enterprises' federal registrations for the One Marks have long been incontestable pursuant to 15 U.S.C. § 1065. *See* Reg. Nos. 1,481,006; 1,328,866; and 1,331,207. On January 6, 2016, Applicant filed its Answer, attached hereto as Exhibit A, which fails to respond to any of the specific allegations contained in DRL Enterprises' Notice of Opposition. In fact, Applicant's Answer does not admit or deny a single allegation in DRL Enterprises'

Notice of Opposition. Rather, Applicant's Answer simply sets forth general, conclusory statements. As such, is formally deficient and non-responsive in its entirety. In addition, Applicant's Answer consists almost entirely of improper matter, including argument bearing on the merits of DRL Enterprises' claim of likelihood of confusion, attacking the validity of DRL Enterprises' incontestable registrations, and contesting the "fame" of DRL Enterprises' One Marks. For these reasons, Applicant's Answer should be stricken in its entirety.

I. Applicant's Answer Fails to Admit or Deny DRL Enterprises' Allegations

The Trademark Rules of Practice provide that "[a]n answer shall state in short and plain terms the applicant's defenses to each claim asserted and shall admit or deny the averments upon which the opposer relies." 37 C.F.R. § 2.106(b)(1); TBMP § 311.02; *see also* Fed. R. Civ. P. 8(b). If the Notice of Opposition consists of numbered paragraphs setting forth the opposer's claim, the applicant's admissions or denials should be made in corresponding numbered paragraphs. TBMP § 311.02(a). Applicant's Answer consists of numbered paragraphs that do not correspond in any way to DRL Enterprises' numbered allegations. Moreover, Applicant fails to expressly admit or deny any of DRL Enterprises' claims, making it impossible for DRL Enterprises to discern the specific claims at issue for discovery purposes. Applicant's Answer should therefore be stricken in its entirety as impertinent and insufficient based solely on these informalities, which cause Applicant's Answer to unnecessarily clutter these proceedings. *See* TBMP § 506.01.

II. Applicant's Answer Consists of Improper Matter

In addition to being non-responsive, Applicant's Answer consists of argument bearing on the merits of DRL Enterprises' claim, an attack on the validity of DRL Enterprises' registrations,

and assertions that DRL Enterprises' marks are not famous. All such matter is improper and impermissible.

A. Applicant's Answer Constitutes an Improper Attempt to Argue the Merits of Likelihood of Confusion

An answer should not argue the merits of the allegations in a Notice of Opposition but rather should state that each allegation is admitted or denied. TBMP § 311.02. Applicant's Answer, however, is rife with factual allegations and legal argument directed toward the merits of DRL Enterprises' claim of likelihood of confusion. For example, Applicant's Answer provides:

> [Applicant] is among the most prominent, best-selling and innovative vaporizer companies in the United States and throughout the World. …
>
> The Atmos 510 i50 box mod is an aromatherapy vaporizer used for the purposes of aromatherapy use only …
>
> When analyzing Applicant's and Opposer's marks objectively, a reasonable consumer would not be confused by the two marks, as Opposer's mark uses only roman numerals, and Applicant's mark uses a combination of roman numerals and roman alphabet.

See Ex. A, Answer at ¶¶ 4, 8 and 15. Such matter constitutes an improper attempt to argue the merits of DRL Enterprises' allegations, which fails to satisfy the requirements of 37 C.F.R. § 2.106(b)(1) and Fed. R. Civ. P. 8(b) that the answer simply admit or deny the allegations set forth in the complaint. Applicant's improper argument should therefore be stricken. *See Esso Standard Oil Co. v. The Standard Motor Co. Ltd.*, 120 USPQ 311, 312 (TTAB 1959) (striking allegations of third party use of opposer's mark because evidence and argument bearing on likelihood of confusion was proper only at final hearing and not at pleading stage).

B. Applicant's Answer Constitutes an Impermissible Attack on DRL Enterprises' Incontestable Registrations

An answer to a Notice of Opposition may not collaterally attack the validity of the trademark registrations asserted against the applicant. 37 C.F.R. § 2.106(b)(2)(ii); TBMP § 311.02. In its Answer, Applicant asserts that DRL Enterprises' marks are "weak and does not afford protection [sic] under the Lanham Act because the mark is [sic] descriptive." *See* Ex. A, Answer at 4. Applicant further asserts that "Opposer's trademarks … are exactly what the product is: pieces of paper that are in length of 1 inch, 1.25 inches, and 1.5 inches," *Id*. at ¶ 21, and that "in light of the above, Opposer's mark [sic] should not receive protection under the Lanham Act because … it is too weak for the purposes of this opposition." In addition to being patently incorrect,[1] such contentions constitute an attack on the validity of DRL Enterprises' pleaded registrations. *See, e.g., Giant Food, Inc. v. Standard Terry Mills, Inc.*, 229 USPQ 955, 962 (TTAB 1986) (defenses seeking for pleaded registration to be held "unenforceable and ineffective" must be asserted as compulsory counterclaims with payment of cancellation fee). Moreover, DRL Enterprises' registrations for the One Marks are more than five years old and are incontestable pursuant to 15 U.S.C. § 1065. Accordingly, they cannot be challenged on grounds of mere descriptiveness under Section 2(e) of the Lanham Act, 15 U.S.C. § 1052(e). *See also* TBMP § 307.02(a). Matter directed toward the validity of DRL Enterprises' registrations should therefore be stricken.

C. Matter in Applicant's Answer Contesting the Fame of DRL Enterprises' Marks Is Irrelevant

Finally, Applicant's Answer includes matter asserting that DRL Enterprises' One Marks are not "famous." For example, Applicant claims that "[s]ince Opposer's mark and other forms

[1] DRL Enterprises' One Marks do not correspond to any dimension or measurement of the cigarette papers with which they are used.

of the mark [sic] have, and are currently in widespread use [sic], Opposer's mark is not famous and therefore cannot acquire the protection of a 'famous mark,' which is what Opposer is seeking to gain." *See* Ex. A, Answer at ¶ 31. Applicant proceeds to set forth factual allegations regarding third-party use of purportedly similar marks, *Id*. at ¶¶ 33-37, concluding that "Opposer lacks protection under a federal dilution statute." *Id.* at ¶¶ 37-38. These allegations and argument are entirely irrelevant, as DRL Enterprises has not alleged that its One Marks are famous within the definition of 15 U.S.C. § 1125(c). Rather, DRL Enterprises' Notice of Opposition alleged only likelihood of confusion pursuant to 15 U.S.C. § 1052(d). Matter in Applicant's Answer directed to the "fame" of DRL Enterprises' marks should accordingly be stricken.

Conclusion

Applicant's Answer is non-responsive and insufficient because it fails to admit or deny any of the allegations contained in DRL Enterprises' Notice of Opposition, making it impossible for DRL Enterprises to discern the particular claims at issue. Rather, Applicant's Answer consists of (i) improper argument directed toward the merits of DRL Enterprises' claims; (ii) an impermissible attack on the validity of DRL Enterprises' pleaded registrations; and (iii) irrelevant assertions regarding the fame of DRL Enterprises' One Marks. Applicant's Answer is manifestly deficient and will merely clutter the proceedings, and it should therefore be stricken.

Respectfully submitted,

Dated: January 26, 2016

/s/ Antony J. McShane

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CERTIFICATE OF SERVICE

I, Andrew S. Fraker, an attorney, state that I served a copy of ***Opposer's Motion to Strike Applicant's Answer*** upon counsel for Applicant:

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via First Class U.S. Mail, with a courtesy copy via email, on this 26th day of January, 2016.

/Andrew S. Fraker/
Andrew S. Fraker

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